as payee should indorse, and no other. Similarly where the name of the payee is wrongly designated, an indorsement by the party intended as payee will pass a good title, despite the variance in names.[14]

In these cases, the negligence or diligence of the defrauded party — generally the drawer of the instrument — should not, as a rule, be material in determining his liability.[15] Nevertheless a rule which will protect the *bona fide* purchaser accords with justice. The consequences of the mistake should fall upon the drawer rather than on the purchaser, since the mistake is primarily the former's, whether he has himself been deceived or has deliberately tried to shift the burden of identification by giving the impostor a negotiable instrument[16] instead of cash. The fraud upon the drawer facilitated a fraud upon the purchaser. In short, the defrauded drawer of the instrument should have an equitable or personal defense rather than a legal or real defense.[17] No difficulty should be experienced in handling the variety of facts which may be presented, if impersonation is treated like fraud and not like forgery. In this way some certainty,[18] an undoubtedly desirable attribute in this branch of the law, can be approximated.

CONSTRUCTIVE MURDER — DRUNKENNESS IN RELATION TO *MENS REA*. — The actual decision and the *dicta* in a recent case in the House of Lords [1] nicely illustrates the incessant struggle between the objective and the subjective points of view in the criminal law,[2] — between the idea of punishment as retribution based on desert,[3] and that of punishment as prevention based on social necessity.[4] The defendant in perpetration of rape upon a young girl put his hand over her mouth to stifle her cries and thus suffocated her. On an indictment for murder, his defence was that he was so drunk that he did not know his acts to be dangerous. He was convicted of murder and the conviction is here sustained.

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[14] Moore *v.* Anderson, 8 Ind. 18 (1856); Shaw, Kendall & Co. *v.* Brown, 128 Mich. 573, 87 N. W. 757 (1901). See NEGOTIABLE INSTRUMENTS LAW, § 43.

[15] See Charles L. McKeehan, "A Review of the Ames-Brewster Controversy," 41 AMER. L. REG. N. S. 503, 507.

[16] Gallo *v.* Brooklyn Savings Bank, *supra*, and Western Union *v.* Bimetallic Bank, *supra*, in effect permit a drawer, who is dubious and hesitant about giving cash, to protect himself absolutely by writing out a check. In other words, the drawer can successfully shift to the purchaser of the check the entire responsibility of identification. The decisions in these two cases, it is submitted, are erroneous.

[17] As to the nature of defenses, real and personal, see the late Dean Ames' learned summary. 2 AMES, CASES ON BILLS AND NOTES, 811–813.

[18] See Charles L. McKeehan, "A Review of the Ames-Brewster Controversy," *supra*, 508, n. 12.

[1] Director of Public Prosecutions *v.* Beard, [1920] A. C. 479. See RECENT CASES, 89.

[2] There are here two fundamentally conflicting schools of juristic thought. Both start from the act which injures the state, but the one focuses on the determination of the moral blameworthiness of the actor, the other on the repressive control of certain types of action.

[3] See SIR JAMES STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND, 1 ed., 99; WOOLSEY, POLITICAL SCIENCE, 334.

[4] See HOLMES, COMMON LAW, Ch. II; SALMOND, JURISPRUDENCE, 4 ed., §§ 28, 29. However important the preventive aspect of the criminal law may be, it is doubtless true that "punishment is not just because it deters; it deters because it is felt to be just." See Victor Cousin, Preface to the Gorgias of Plato.

On the question of constructive murder, the decision clearly reasserts the once well-settled law that an act done in the furtherance of a violent felony and resulting in death is murder.[5] Some doubt had been cast on this doctrine by the decisions in certain abortion cases [6] and by a *dictum* of Justice Stephen in *Reg.* v. *Serne*,[7] where it was suggested that for murder, it was necessary to show not only the intent to commit a felony but a knowledge that the felony was dangerous to life.[8] This idea has now, fortunately, been exploded effectively by a court of highest authority.

The actual holding, on the facts of this case,[9] with respect to the plea of drunkenness is likewise in accord with well-established principles. Voluntary drunkenness [10] has never, in English law,[11] been an excuse for a crime.[12] In certain crimes, however, which require a specific intent, such a state of drunkenness as to negative the presence of that intent negatives the crime.[13] Here the death arose in the course of commission

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[5] Queen *v.* Franz, 2 Fost. & F. 580 (1861); State *v.* Cooper, 13 N. J. L. 361 (1833); State *v.* Werner, 144 La. 380, 80 So. 596 (1918).

[6] Rex *v.* Greenwood, 7 Cox C. C. 404 (1857); Rex *v.* Whitmarsh, 62 J. P. 711 (1898); Rex *v.* Lumley, 22 Cox C. C. 635 (1911).

[7] 16 Cox C. C. 311, 313 (1887).

[8] This modification had also been suggested in legislative circles. In 1874 a bill for the definition of homicide was introduced into the House of Commons, providing that the defendant must have known the act to be dangerous. It was not passed, and in 1879 the Royal Commission appointed to consider the law relating to indictable offenses expressly state their divergence from it on this point, and in their Draft Code (sec. 175) define as murder all cases where death is caused by the infliction of grievous bodily injury or the willfully stopping of breath for the purpose of certain heinous offenses, including all the felonies dangerous to life. See REPORT OF ROYAL COMMISSION ON INDICTABLE OFFENSES (1879), 24.

Such a salutary rule seems not only expedient but perfectly just, for "if a man begins attacking the human body he must take the consequences if he goes farther than he intended." *Per* Stephen, J., in Reg. *v.* Serne, *supra*, at p. 313.

[9] The court held that it was clear that the defendant was not too drunk to know that he was committing rape, and hence denied the plea. On strict common-law principles, the result would have been the same even though the defendant's drunkenness had negatived any intent to rape, for the drunkenness itself would have supplied the necessary *mens rea* for that crime. With this strict principle the *dicta* of the court are in apparent conflict.

[10] The distinction has always been made between voluntary and involuntary drunkenness, the later being induced by the fraud or mistake of another, or through a mistake of fact on the part of the drinker himself. Responsibility in the case of involuntary drunkenness is to be determined by the individual's actual mental state. Pearson's Case, 2 Lewin C. C. 144, 145 (1835); People *v.* Robinson, 2 Park. (N. Y.) Crim. Rep. 235, 304 (1855).

Voluntary drunkenness was at one time itself a statutory crime in England, punishable by fine or imprisonment in the stocks. See 4 JAMES 1, c. 5 (1607). But this statute has been repealed, 9 GEO. 4, c. 61, § 35 (1828). And it seems never to have been enforced.

[11] In the law of European countries there is considerable difference as to the extent to which drunkenness may excuse. Austria and Italy are the most lenient, but continental law is, in general, less severe than common law. See R. W. Lee, "Drunkenness and Crime," 27 LAW MAG. AND REV. 308 *et seq.*

[12] Reniger *v.* Fogossa, Plowden, 1, 19 (1551); Burrow's Case, 1 Lewin C. C. 75 (1823). The American decisions are to the same effect. Rafferty *v.* People, 66 Ill. 118 (1872); Commonwealth *v.* Malone, 114 Mass. 295 (1873).

[13] The intent is part of the crime, and if it is not *in fact* present, the crime has not been committed. One so drunk as not to know what he was doing, could have no specific intent and hence could not commit the crime. Reg. *v.* Cruse, 8 C. & P. 541 (1838)

of the felony of rape which requires no specific intent. Drunkenness could therefore have no effect on the elements of that felony or of the murder,[14] the malice necessary for the latter being implied, without more, from the commission of the rape.

But while the court in its decision thus steadfastly faces toward the objective criterion and refuses to admit those considerations of moral blame which denote the play of the "subjective-desert" motive, Janus-like it looks in the opposite direction in certain of its *dicta*.[15] It suggests that drunkenness may affect the ordinary *mens rea*.[16] This is rank heresy in the common law and no attempts to support it have been successful.[17] Its renewed outcropping in these *dicta*, however, raises again the question as to whether this modification should not be permitted, whether drunkenness should not in some circumstances affect *mens rea*.

From the objective-preventive point of view, such a suggestion is anathema, vicious in social consequence, impossible in practical administration. The maintenance of the general security demands that one so unmindful of his social duty as to get drunk should be held strictly

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(assault with intent to kill); Reg. *v.* Doody, 6 Cox C. C. 463 (1854) (attempted suicide); People *v.* Walker, 38 Mich. 156 (1878) (larceny); People *v.* Blake, 65 Cal. 275, 4 Pac. 1 (1884) (forgery); People *v.* Eggleston, 186 Mich. 510, 152 N. W. 944 (1915) (burglary).

So also where there are statutory degrees of murder — murder in the first degree requiring deliberate premeditated malice; drunkenness by negativing this premeditation may reduce the killing to second degree murder. Pirtle *v.* State, 9 Humph. (Tenn.) 663 (1849); State *v.* Johnson, 40 Conn. 136 (1873); People *v.* Williams, 43 Cal. 344 (1872).

And it is error for the court to fail to instruct the jury to this effect. Hopt *v.* People, 104 U. S. 631 (1881).

[14] The court thus easily distinguishes this case from Reg. *v.* Meade (1909), 1 K. B. 895, over which considerable controversy had arisen. There the defendant in a drunken fit beat his wife to death. It was charged that death arose from violence done with intent to do grievous bodily injury, and it was therefore necessary to prove this specific intent. The court charged, quite correctly, that, if the defendant's mind was so affected by drink that he did not know what he was doing was dangerous, he could not have the intent to do grievous bodily injury, and in this case such drunkenness would destroy one of the constituents of the offense. The language of the court was rather general, and was widely interpreted as meaning that in any crime of violence, proof that the defendant was so drunk as not to realize his acts to be dangerous, would relieve him from responsibility therefor. The court in the principal case destroys this erroneous interpretation by restricting the *dicta* in Reg. *v.* Meade to those cases in which specific intent is necessary.

[15] "I do not think that the proposition of law deduced from these earlier cases is an exceptional rule, applicable only to cases in which it is necessary to prove a specific intent. . . . This is on ultimate analysis only in accordance with the ordinary law applicable to crime, for, *speaking generally, a person cannot be convicted of a crime unless the mens was rea*. . . . My Lords, drunkenness in this case would be no defense unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it. . . ." Director of Public Prosecutions *v.* Beard, *supra*, 504.

[16] Specific intent must be carefully distinguished from *mens rea*. Specific intent is that qualification of the *act* which makes it criminal. *Mens rea* is that state of the *mind* which makes it responsible.

[17] There have been, however, some loose *dicta* tending toward such a doctrine. "I have ruled that if a man were in such a state of intoxication that he did not know the nature of his act, or that it was wrongful, his act would be excusable." *Per* Day, J., in Reg. *v.* Baines, Lancaster Assizes, Jan. 1886. (Reported in the London *Times* for Jan. 25, 1886, p. 10.) See also Rex *v.* Grindley, 1 Russ. on Crimes, 7 ed., p. 88, n.

responsible for all acts done in that condition.[18] From the subjective-desert standpoint, on the other hand, the modification would be welcome as serving to bring into closer harmony moral and legal responsibility.[19] Ethically it is unjust to fix on a man full blame for a crime which because of his drunken state he was clearly incapable of intending.[20] When his acts are submerged below the threshold of self-conscious direction, his sole culpability lies in the antecedent drinking, not in the present act, a culpability often far less than that which would attach to the intentional doing of the act.[21] His responsibility should be limited to those consequences which at the time of drinking he foresaw or might reasonably have foreseen.[22]

The reconciliation of these two viewpoints resolves largely into the problem of infusing delicate ethical criteria into a practically administrable legal system. The difficulty of proving the exact condition of the defendant's mind and the inability of the jury to judge the *nuances* of drunkenness, lead one to look with hesitancy upon any general modification of the law as suggested in the court's *dicta*.[23] The refinement of the present rule would seem to depend rather upon a growing legal recognition of certain types of alcoholic insanity as medicine is progressively able to define and characterize them.[24] An objective voucher to the degree of the defendant's capacity to act as a rational agent, subject to law, would thus be obtained and his responsibility for his acts modified accordingly.

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[18] A member of society who intentionally "puts an enemy in his mouth to steal away his brains" is highly culpable. Hence it has often been said that the real basis for responsibility in drunkenness lies in this culpability. See ARISTOTLE, NICOMACHEAN ETHICS, Book 3, Ch. V, Par. 6 (translated by Browne); BISHOP, NEW CRIMINAL LAW, 8 ed., Vol. I, § 398 (3).

Austin claims that the ground of liability in the case of the drunken man lies in his "remote inadvertence," just as in the case of a crime committed in ignorance of the law, and indeed the fundamental motive in both cases seems to be the same, *i.e.*, the social demand that all should live consciously responsive to law. See Stroud, "Constructive Murder and Drunkenness," 36 LAW QUART. REV. 268 *et seq.*

[19] See BENTHAM, THEORY OF LEGISLATION (trans. by Hildreth), 263.

[20] Of course one who seeks to nerve himself for a crime by drink should be and is strictly responsible. People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057 (1901).

[21] The culpabilities to be attached to drinking and to rape, for example, are not of equal magnitude. See THOMAS AQUINAS, ETHICUS (trans. by Rickaby), 2 ed., Vol. II, Question CL, Art. IV.

[22] This method of thought would lead to some such distinction as that made in the canon law between *dolus* and *culpa*. A plea of drunkenness might excuse from punishment for *dolus* (intentional injury), but not from that for *culpa* (heedless negligence). The degree of the *culpa*, the guilt and punishment of the defendant would be proportionate to the foreseeable probability of the criminal act at the time of the drinking. See PALEY, MORAL PHILOSOPHY, Book IV, c. 2.

[23] There is a further difficulty here. If drunkenness is permitted to affect the *capacity* for *mens rea*, the state will have the burden of proving that the defendant was *not* so drunk as to be incapable of the criminal intent.

[24] It has been long held that delirium tremens, though superinduced by voluntary drinking, is to be treated as other insanity with respect to responsibility. Reg. *v.* Davis, 14 Cox C. C. 563 (1881); United States *v.* Drew, 5 Mason (U. S.) 28 (1828).

Leading psychiatrists treat all drunkenness as a state of insanity. See KRAFFT-EBING, PSYCHIATRY, I, 35; PATON, PSYCHIATRY, 288.

But courts are reluctant to extend this exemption to other types of alcoholic insanity. People *v.* Fellows, 122 Cal. 233, 54 Pac. 830 (1898) (*mania-a-potu*). And it seems clear that they will not do so until the types of insanity are clearly enough defined for ready diagnosis.